Supreme Court, U.S.
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No. 03- 031638

In the Supreme Court of the United States

EDISON PILGRIM CRAWFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of a conviction under 18 U.S.C. Section 924(e)(1), prior convictions making a defendant eligible for the armed career criminal offense, when used to increase the mandatory minimum sentence beyond the maximum normally available under the original 18 U.S.C. Section 922(g)(1) charge, constitute elements of the offense?

2. Whether after a plea and conviction of a Section 922(g)(1) offense with a 10-year maximum sentence the Court can then sentence the defendant under Section 924(e)(1) to a minimum mandatory 15-year up to a maximum life sentence without violating the defendant's right to a jury trial?

3. Whether the District Court's order treating Section 924(e)(1) as a sentencing enhancement constitutes a final decision of a collateral order and is, therefore, subject to interlocutory appeal?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

I. THE QUESTION WHETHER, FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. SECTION 924(e), PRIOR CONVICTIONS MAKING A DEFENDANT ELIGIBLE FOR THE ARMED CAREER CRIMINAL OFFENSE, WHEN USED TO INCREASE THE MANDATORY MINIMUM SENTENCE BEYOND THE MAXIMUM NORMALLY AVAILABLE FOR A SECTION 922(g)(1) CHARGE, CONSTITUTE ELEMENTS OF THE OFFENSE, IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT 4

A. The Facts Surrounding This Court's Decision in *Apprendi v. New Jersey* Cast Significant Doubt on the Viability of Its Prior Decisions Regarding the Proper Legal Standard for Proving Prior Convictions When They Serve to Increase a

Sentence Beyond the Prescribed Statutory Maximum 6

B. The Situation Surrounding Mr. Crawford's Three Previous Convictions Demonstrates the Need to Apply the "Reasonable Doubt" Standard to Potentially Qualifying Section 924(e) Prior Convictions 9

II. THE DISTRICT COURT'S ORDER TREATING 18 U.S.C. SECTION 924(e) AS A SENTENCING ENHANCEMENT CONSTITUTES A FINAL DECISION OF A COLLATERAL ORDER AND IS, THEREFORE, SUBJECT TO INTERLOCUTORY APPEAL 12

A. Mr. Crawford Cannot Proceed With Sentencing and Appeal This Ruling Because He Waived His Appellate Rights in His Plea Agreement in Order to Receive the Benefit of only Being Sentenced Pursuant to Section 922(g) . . . 13

B. Mr. Crawford Cannot Withdraw His Plea Without Waiving His Right Not to Expose Himself to the Greater Jeopardy of Section 924(e) for the Same Conduct for Which He was Convicted Under Section 922(g) 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Abney v. United States, 431 U.S. 651 (1977) 17

Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997 (1997) 5

Almendarez-Torres v. United States, 523 U.S. 224 (1998) . . . . . passim

Apprendi v. New Jersey, 530 U.S. 466 (2000) . . . . . passim

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 12

Ricketts v. Adamson, 483 U.S. 1 (1987) 16

Taylor v. United States, 495 U.S. 575 (1990) 11

United States v. Andis, 333 F.3d 886 (8th Cir. 2003) 14

United States v. Bock, 312 F.3d 829 (7th Cir. 2002) 4

United States v. Bushert, 997 F.2d 1315 (11th Cir. 1993) 14

United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) 4

United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) 9

United States v. Green, 139 F.3d 1002 (4th Cir. 1998) . . 16

United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) . . 14

United States v. Khattak, 273 F.3d 557 (3rd Cir. 2001) . . 14

United States v. Marin, 961 F.2d 493 (4th Cir. 1992) . . . 15

United States v. Murillo-Iniguez, 318 F.3d 709 (6th Cir. 2003) 4

United States v. Peterson, 233 F.3d 101 (1st Cir. 2000) . . 11

United States v. Ready, 82 F.3d 551 (2nd Cir. 1996) 14

United States v. Rodriguez-Arreola, 313 F.3d 1064 (8th Cir. 2002) 5

United States v. Wiggins, 905 F.2d 51 (4th Cir. 1990) . . . 14

United States v. Williams, 184 F.3d 666 (7th Cir. 1999) . 14

Statutes

18 U.S.C. § 922(g)(1) . . . . . passim

18 U.S.C. § 924(e)(1) . . . . . .passim

18 U.S.C. § 1342(a)(1)-(2) 14

18 U.S.C. § 844 2

ALA. CODE § 13A-7-5 (1975) 10

DEL. CODE ANN. tit. 11 § 826 (2003) 10

MICH. COMP. LAWS ANN. § 750.110a (1999) 11

MISS. CODE ANN. § 97-17-23 (1996) 11

N.Y. PENAL LAW § 140.30 (1981) 11

S.C. CODE ANN. § 16-11-311, -312 (1976) 11

PETITION FOR A WRIT OF CERTIORARI

Edison Pilgrim Crawford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The order of the court of appeals (Pet. App. 2) is unreported. The order denying staying of the mandate (Pet. App. 3) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying Mr. Crawford's appeal was entered on March 19, 2004. (Pet. App. 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(g)(1) of Title 18 of the United States Code provides, in pertinent part: "It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to possess * * * or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Section 924(e)(1) of Title 18 of the United States Code provides, in pertinent part: "In the case of a person who violates Section 922(g) of this title and has three previous convictions by any court referred to in Section 922(g)(1) of this title for a violent felony * * * committed on occasions different from one

another, such person shall be * * * imprisoned not less than fifteen years * * *."

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides, in pertinent part: "No person shall * * * be subject for the same offense to be twice put in jeopardy * * * nor be deprived of * * * liberty * * * without due process of law * * *."

The Sixth Amendment of the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *."

STATEMENT

On June 30, 2003, pursuant to a written plea agreement, the United States District Court for the Western District of Virginia convicted Edison Pilgrim Crawford on two charges in an information. (Pet. App. 4). Count One charged Mr. Crawford with being a felon in possession of a firearm, in violation of 18 U.S.C. Section 922(g)(1). *Id.* Count Two charged that Mr. Crawford illegally possessed marijuana, in violation of 21 U.S.C. Section 844. *Id.* Both parties agreed that Section 2k2.1 of the United States Sentencing Guideline ("U.S.S.G."), involving between eight and twenty-four firearms, would apply to the firearms offense; that Mr. Crawford would not receive a Section 2K2.1(b)(2) adjustment; that Mr. Crawford would receive a three-level downward adjustment for acceptance of responsibility under Section 3E1.1; and that the government would recommend that Mr. Crawford be sentenced at the low end of the applicable guideline range (18 to 24 months). (Pet. App. 4-5). Further, Mr. Crawford was notified in the written plea agreement, and at his plea hearing, that he faced a maximum sentence of 10 years for the firearms charge.

(Pet. App. 4, 8).

On August 7, 2003, the Pre-Sentence Report ("PSR") suggested that Mr. Crawford's criminal history qualified him as an armed career criminal under 18 U.S.C. Section 924(e), subjecting him to a mandatory 15-year statutory minimum sentence and a maximum sentence of life imprisonment. On January 5, 2004, the district court denied Mr. Crawford's motion for "specific performance" of the plea agreement. (Pet. App. 10). Further, the court held that withdrawal of Mr. Crawford's plea was the only available remedy despite the government's failure to allege the applicability of Section 924(e) in the indictment. (Pet. App. 10). Prior to requiring Mr. Crawford to choose between proceeding with the sentencing or withdrawing his plea, the district court, upon Mr. Crawford's request, recessed the proceedings to allow Mr. Crawford the opportunity to pursue an appeal. (Pet. App. 10-11). On March 19, 2004, the Fourth Circuit Court of Appeals dismissed Mr. Crawford's appeal of the district court's ruling for lack of jurisdiction. (Pet. App. 2). On April 6, 2004, the Fourth Circuit Court of Appeals likewise dismissed Mr. Crawford's motion to stay the mandate pending this petition for a writ of certiorari. (Pet. App. 3).

REASONS FOR GRANTING THE PETITION

I THE QUESTION WHETHER, FOR PURPOSES OF A CONVICTION UNDER 18 U.S.C. SECTION 924(e), PRIOR CONVICTIONS MAKING A DEFENDANT ELIGIBLE FOR THE ARMED CAREER CRIMINAL OFFENSE, WHEN USED TO INCREASE THE MANDATORY MINIMUM SENTENCE BEYOND THE MAXIMUM NORMALLY AVAILABLE FOR A SECTION 922(g)(1) CHARGE, CONSTITUTE ELEMENTS OF THE OFFENSE, IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT WOULD BENEFIT FROM CLARIFICATION BY THIS COURT.

The issue regarding whether certain factors constitute sentence enhancements or elements of an offense continues to plague federal criminal litigation. This Court's prior decisions in both *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) have raised doubt whether recidivist sentence enhancements constitute elements of an offense. *See United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) ("But no matter how much in doubt the continuing viability of *Almendarez-Torres* may be, that decision is not overruled unless and until the United States Supreme Court says it is."); *United States v. Murillo-Iniguez*, 318 F.3d 709, 713 (6th Cir. 2003) ("We have said, '[a]lthough the Court's decision in *Apprendi* arguably casts doubt on the correctness of the holding in *Almendarez-Torres*, ... *Almendarez-Torres* remains the law.'") (citations omitted); *United States v. Bock*, 312 F.3d 829, 831 (7th Cir. 2002) ("In short, the issue Bock raises, while effectively a settled one, is one on which reasonable minds might disagree. It is not out of the question that the issue might be reexamined by the Supreme Court."); *United States v.*

Rodriguez-Arreola, 313 F.3d 1064, 1068 n. 3 (8th Cir. 2002) ("Concerned that the Supreme Court has noted but not resolved the issue, the district court applied the clear-and-convincing standard of proof in finding that Rodriguez committed an aggravated felony for sentencing purposes because the issue significantly affected the severity of his sentence."). The case at bar has the potential to allow this Court to definitively rule on the particular issue regarding whether prior convictions, when used to elevate a defendant's sentence beyond the statutory maximum for the actual offense, constitute elements of the offense that must be proved beyond a reasonable doubt. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

The question presented by this case is an important question of federal law. Due to the severe penalties that result from recidivist statutes, such as Section 924(e), and their increased use across the country, countless defendants are sentenced for time periods that extend much longer than the maximum recommended for the charged crime. This Court should take the opportunity to clarify this issue once and for all and determine that facts, which carry such draconian results, constitute elements of the offense and should be proved beyond a reasonable doubt.

A. The Facts Surrounding This Court's Decision in *Apprendi v. New Jersey* Cast Significant Doubt on the Viability of Its Prior Decisions Regarding the Proper Legal Standard For Proving Prior Convictions When They Serve to Increase a Sentence Beyond the Prescribed Statutory Maximum.

In *Almendarez-Torres*, this Court rejected the petitioner's constitutional claim to have his recidivism treated as an element of the offense where it increased his maximum available sentence. 523 U.S. at 247. Additionally, the *Almendarez-Torres* Court expressed no view on "whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence." *Id.* at 248-49 (citations omitted).

Two years later, in *Apprendi v. New Jersey*, this Court held that when a judge's findings based on a preponderance of the evidence can increase the maximum punishment beyond that normally available under the charging statute, it constitutes a substantive offense. 530 U.S. at 495. However, this Court declined to apply its rationale to the issue of prior convictions because the petitioner in *Apprendi* did not challenge the validity of the Court's previous decision in *Almendarez-Torres* and, therefore, the Court did not need to resolve the recidivist issue in order to reach its conclusion. *Id.* at 489-90.

The Court in *Apprendi* did, however, address the apparent conflict of its holding with that of *Almendarez-Torres*. Justice Stevens, in delivering this Court's opinion stated:

> **Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were**

> **contested**, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today....

530 U.S. at 489-90 (emphasis added).

Thus, *Apprendi's* majority opinion itself suggests that when confronted again with the recidivist issue, this Court will likely rule in favor of applying the "beyond a reasonable doubt" standard to prior convictions when they are used to increase the penalty for a crime beyond the prescribed statutory maximum. As *Apprendi* provides, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 530 U.S. at 494 (footnote omitted).

Additionally, Justice Thomas' concurring opinion in *Apprendi* further demonstrates that this Court will likely overturn *Almendarez-Torres* when given the opportunity. Of specific importance is that Justice Thomas voted with the majority in *Almendarez-Torres*, a 5-4 decision. In *Apprendi*, however, Justice Thomas stated:

> The consequence of the above discussion for our decisions in *Almendarez-Torres* and *McMillan* should be plain enough...one of the chief errors of *Almendarez-Torres* – an error to which I succumbed – was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. 52 U.S., at 243-44, 118 S.Ct. 1219; see *id.*, at 230, 241, 118 S.Ct. 1219. For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by

> which a fact enters into the sentence. **If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element.**

530 U.S. at 520-21 (emphasis added).

Thus, Justice Thomas' indication of a substantial likelihood that he would change his vote on the recidivist issue suggests that this Court, when confronted, will apply its *Apprendi* reasoning and overturn *Almendarez-Torres*.

At the very least, Mr. Crawford's case directly raises the recidivist issue discussed but not decided in *Apprendi*. In the case at bar, Mr. Crawford clearly meets the *Apprendi* principle disallowing an increase in a defendant's sentence beyond the statutory maximum on facts not contained in an indictment and proved beyond a reasonable doubt.[1] Prior to the application of Section 924(e), Mr. Crawford faced a maximum sentence of 10 years for the Section 922(g)(1) firearm violation. The Section 924(e) charge increases Mr. Crawford's sentence by at least five years -- from a 10-year maximum to a 15-year mandatory minimum. The only question left unresolved is whether Section 924(e)'s recidivist status relieves the government from having to include Section 924(e) in the indictment, or information, and prove the element of qualifying prior convictions beyond a reasonable doubt.

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[1] *See* 530 U.S. at 490 ("it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.").

B. The Situation Surrounding Mr. Crawford's Three Previous Convictions Demonstrates the Need to Apply the "Reasonable Doubt" Standard to Potentially Qualifying Section 924(e) Prior Convictions.

The three previous convictions found to make Mr. Crawford eligible for the Section 924(e) offense and, therefore, the mandatory 15-year minimum sentence do not clearly, on their face, qualify Mr. Crawford as an armed career offender. The dispute over whether they do qualify for such designation is highlighted by the fact that neither the government nor defense counsel believed they were applicable.[2] In fact, the prior convictions were never mentioned in the plea agreement or at the plea hearing.

The three previous breaking and entering convictions listed in the PSR, and responsible for Mr. Crawford's designation as an armed career criminal under Section 924(e), occurred over a three day span thirty-three years ago. All three break-ins involved unlawful entry into places of business, not dwellings, and did not involve the use or possession of firearms or any other weapons. Further, the PSR only provides a one-paragraph, hearsay repetition of facts surrounding the convictions, which Mr. Crawford may or may not have challenged. *See United States v. Corona-Sanchez*, 291 F.3d 1201, 1212-213 (9th Cir. 2002) (holding that a presentence report alone is not sufficient to establish that a defendant was convicted of a qualifying offense).

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[2] *See* Pet. App. at 5 ("the United States agrees to recommend...a sentence of incarceration at the low end of the applicable sentencing guideline range."). Both parties understood this recommendation to be between 18-24 months, as did the probation officer in his PSR.

Mr. Crawford is now fifty-two years old and his proclivity to commit a certain act thirty years ago cannot support a finding of propensity to commit a similar crime today. This position is substantiated by the fact that these three previous break-ins are not admissible in determining Mr. Crawford's actual adjusted offense level outside the scope of Section 924(e). These convictions do not qualify the defendant as a career criminal[3] nor can they be used to adjust the defendant's criminal history category. *See* U.S.S.G. Section 4A1.1 (commentary).

According to the U.S.S.G. Sentencing Table, these convictions do not result in any criminal history points and absent Section 924(e), Mr. Crawford's criminal history category would be Category I. (Pet. App. 7). Furthermore, it is unclear whether Crawford's prior convictions would qualify as violent felonies in Virginia, the jurisdiction in which Mr. Crawford was convicted of the break-ins.[4] In fact, many states make distinctions between burglaries of dwellings and non-dwellings for the exact purpose of distinguishing between especially dangerous forms of burglary.[5]

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[3] *See* U.S.S.G. § 4B1.2 (defining only "burglary of a dwelling" as a crime of violence).

[4] Mr. Crawford was convicted in 1971 and the current Virginia burglary and breaking and entering statutes were enacted in 1975.

[5] *See* ALA. CODE § 13A-7-5 (1975) (first degree burglary requires dwelling and specified aggravating circumstances); DEL. CODE ANN. tit. 11, § 826 (2003) (second degree rather than third if dwelling, first degree is dwelling at night with aggravating circumstances); MICH.

In *Taylor v. United States*, this Court held that state definitions of burglary could not be used to determine if a prior state conviction qualified a defendant under Section 924(e). 495 U.S. 575, 110 S.Ct. 2143 (1990). Rather, this Court determined that a crime is a burglary for the purposes of Section 924(e) if it has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. Even under this Court's holding in *Taylor*, there still exists potential for dispute over the nature of the break-in and whether criminal intent was an element of the underlying state conviction. *See United States v. Peterson*, 233 F.3d 101 (1st Cir. 2000) (ruling that a conviction under a Rhode Island law lacking a criminal intent requirement did not constitute a conviction for a violent felony under Section 924(e)).

The facts surrounding Mr. Crawford's previous convictions illustrate the potential difficulty in determining whether prior convictions in general qualify under Section 924(e), even after this Court's holding in *Taylor*. It is submitted that under the analysis of this Court in *Apprendi*, prior conviction determinations that carry with them such draconian consequences, should be placed before a jury and proved beyond a reasonable doubt.

COMP. LAWS ANN. § 750.110a (1999) ("home invasion" ordinarily higher level offense than breaking and entering any building); MISS. CODE ANN. § 97-17-23 (1996) (higher offense if "dwelling house"); N.Y. PENAL LAW § 140.30 (1981) (dwelling plus aggravating circumstances is first degree burglary); S.C. CODE ANN. § 16-11-311, -312 (1976) (first degree burglary if dwelling and aggravating circumstances; second rather than third degree if dwelling).

II THE DISTRICT COURT'S ORDER TREATING 18 U.S.C. SECTION 924(e) AS A SENTENCING ENHANCEMENT CONSTITUTES A FINAL DECISION OF A COLLATERAL ORDER AND IS, THEREFORE, SUBJECT TO INTERLOCUTORY APPEAL.

The Supreme court, in *Cohen v. Beneficial Industrial Loan Corp.*, set forth the factors that must be met for an order to be considered a final decision: (1) whether the order fully disposes of the motion; (2) whether it resolved an issue completely collateral to the cause of action asserted; and (3) whether it involved an important right which would be lost, probably irreparably, if review had to await final judgment. 337 U.S. 541, 69 S.Ct. 1221 (1949).

On January 5, 2004, the district court issued an order that falls within the final decision of a collateral order standard. First, the court conclusively answered and fully disposed of Mr. Crawford's motion when it ruled in favor of the government's position that Section 924(e) be treated as a sentence enhancement and, therefore, did not have to be contained in the indictment or proved beyond a reasonable doubt. Second, this order resolved a question collateral to the principle issue at stake; *i.e.*, Mr. Crawford's guilt or innocence on the pending charges. Third, the district court's order involves two separate important rights which would be lost, probably irreparably, absent interlocutory appeal.

The nature in which the issue surrounding Mr. Crawford's eligibility for an increased sentence under Section 924(e) arose has left Mr. Crawford with the Hobbesian choice of either fulfilling the original terms of his plea agreement and proceeding to sentencing, or, withdrawing his plea, thereby vacating his conviction and proceeding to trial. Under the first

option, the terms of Mr. Crawford's plea agreement will waive his right to appeal the recidivist issue. By choosing the second option, Mr. Crawford will voluntarily waive any double jeopardy protection to which he is now entitled. Therefore, absent interlocutory appeal, the district court's ruling will force Mr. Crawford to choose between two rights he ordinarily would be guaranteed by both the Constitution and traditional notions of justice.

A. Mr. Crawford Cannot Proceed With Sentencing and Appeal This Ruling Because He Waived His Appellate Rights in His Plea Agreement in Order to Receive the Benefit of only being Sentenced Pursuant to Section 922(g).

If Mr. Crawford proceeds to sentencing, by the terms of his plea agreement, any possible appeal of the recidivist issue will be rendered moot and, therefore, evade review. Mr. Crawford voluntarily entered into a plea agreement with the government pursuant to Rule 11 of the Federal Rules of Criminal Procedure. As part of that agreement, Mr. Crawford agreed that "I am knowingly and voluntarily waiving any right to appeal sentencing guidelines factors, and am voluntarily willing to rely on the Court in sentencing me under the Sentencing Guidelines." (Pet. App. 5). Furthermore, Mr. Crawford agreed to waive his right to collaterally attack "the judgment of any part of the sentence imposed upon me by the Court." (Pet. App. 5).

The provision waiving Mr. Crawford's right to appeal any sentence is a standard non-negotiable clause used in many, if not most, federal criminal plea agreements around the country. By its terms, Mr. Crawford's plea agreement precludes his right to appeal the district court's application of the 15-year mandatory minimum sentence. Furthermore, the

waiver of appeal is non-negotiable and all Circuits routinely uphold the enforceability of the waiver. *See United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990); *United States v. Ready*, 82 F.3d 551 (2nd Cir. 1996); *United States v. Khattak*, 273 F.3d 557 (3rd Cir. 2001); *United States v. Williams*, 184 F.3d 666 (7th Cir. 1999); *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004); *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993).

Although the right to challenge on appeal a sentence imposed as a perceived incorrect application of law, or the Sentencing Guidelines, is permitted by statute,[6] the terms of Mr. Crawford's plea agreement will likely be found by a reviewing court to constitute a valid waiver of his appellate rights. Specifically, Mr. Crawford's plea agreement reads:

> I agree that after my full and fair sentencing hearing, I will not then appeal any sentencing guidelines factors or the Court's application of the sentencing guidelines factors to the facts of my case. I am knowingly and voluntarily waiving any right to appeal sentencing guidelines factors, and am voluntarily willing to rely on the Court in sentencing me under the Sentencing Guidelines.

(Pet. App. 5).

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[6] *See* 18 U.S.C. 1342(a)(1)-(2) ("A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence...was imposed in violation of law [or] was imposed as a result of an incorrect application of the guidelines....").

In *United States v. Marin*, the defendant entered a plea agreement containing similar language to that included in Crawford's written plea agreement. 961 F.2d 493 (4th Cir. 1992). Specifically, Marin expressly waived his right to appeal his sentence on Sentencing Guidelines grounds or any other ground. *Id.* at 494. Following his sentencing, Marin appealed on the grounds that the district court misapplied the Sentencing Guidelines by improperly departing upward without giving him proper notice. *Id.* at 495. The *Marin* Court held that even had the district court misapplied the Guidelines in computing his sentence, Marin knowingly and voluntarily waived his right to appeal the issue. *Id.* at 496.

Mr. Crawford's plea agreement contains similar language to that found to preclude appeal in *Marin*. Therefore, Mr. Crawford cannot comply with the terms of his plea agreement without sacrificing his right to appeal what he believes will be an unconstitutional application of Section 924(e). The harm that will result from forfeiting his right to appeal is exacerbated by the enormous disparity between the sentence all parties in the case originally believed he would be facing and what the district court will actually order.

Of particular significance as well is the fact that Mr. Crawford entered his plea absent any knowledge that a conviction could result in the application of Section 924(e), carrying with it the mandatory 15-year minimum sentence. Neither the government nor Mr. Crawford's counsel believed Section 924(e) would apply. It was only after the court accepted his plea and convicted him on the Section 922(g)(1) charge that Mr. Crawford was given notice of the draconian 15-year mandatory minimum that would be applied.

B. Mr. Crawford Cannot Withdraw His Plea Without Waiving His Right Not to Expose Himself to the Greater Jeopardy of Section 924(e) for the Same Conduct for Which He was Convicted Under Section 922(g).

Consistent with traditional notions of double jeopardy and plea agreements, Mr. Crawford's agreement contained a provision reading: "I understand that except as provided for in this plea agreement, there will be no further prosecutions of me in the Western District of Virginia for any matters about which the United States has specific knowledge gained from the investigation that gave rise to the charges contained in this Indictment." (Pet. App. 5).

As stated previously, the district court's ruling has placed Mr. Crawford in the precarious position of having to choose between fulfilling his plea agreement thereby subjecting himself to a 15-year minimum sentence nowhere mentioned in the plea agreement or Rule 11 colloquy itself, or withdrawing his plea thereby exposing him to further jeopardy for the same offense. By choosing the latter, Mr. Crawford will sacrifice his Fifth Amendment right protecting him against double jeopardy. *United States v. Green*, 139 F.3d 1002, 1005 (4th Cir. 1998) ("The Supreme Court has adopted the premise that 'the Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice.'" *citing Ricketts* v. *Adamson*, 483 U.S. 1, 11, 107 S.Ct. 2680, 2686 (1987)).

Because Mr. Crawford now stands convicted of only the Section 922(g)(1) offense, by withdrawing his plea, he will be exposing himself to the greater Section 924(e) offense. However, if this Court agrees with Mr. Crawford that his prior convictions are an element of the offense, then he will only be convicted and sentenced on the Section 922(g) offense. The same result agreed to in the written plea agreement.

It is submitted that a subsequent trial after already being convicted by the district court on the Section 922(g)(1) count would clearly violate the Double Jeopardy Clause of the Fifth Amendment. Even though it is possible that Mr. Crawford could raise this issue during the subsequent trial, he will still be exposed to a second determination of guilt or innocence, which is exactly the harm that the Double Jeopardy protection was designed to avoid. "The 'twice put in jeopardy' language of the Constitution thus **relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried**." *Abney v. United States*, 431 U.S. 651, 661, 97 S.Ct. 2034, 2041 (1977) (emphasis added). In other words, Mr. Crawford's motion during any subsequent trial will not remedy the injury he will sustain. If Mr. Crawford is to avoid exposure to double jeopardy, "his [] challenge to the indictment **must be reviewable before that subsequent exposure occurs**." *Id.* at 662 (emphasis added).

Furthermore, if Mr. Crawford is denied the opportunity to appeal the district court's ruling at this point and chooses to withdraw his plea, the government will be free to reindict him under the greater offense of Section 924(e), thereby mooting the issue entirely from review. There is no legal precedent barring the government from pursuing such a course of action. The only source preventing the government from charging him as a career offender in the indictment is their own restraint.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2004

No. 03-

In the Supreme Court of the United States

EDISON PILGRIM CRAWFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 19, 2004

No. 04-4102
CR-02-42

United States of America
Plaintiff - Appellee

v.

Edison Pilgrim Crawford
Defendant - Appellant

ORDER

Appellant has filed a motion to expedite appeal. Appellee has filed a response to the motion to expedite appeal and a motion to dismiss the appeal. Appellant has filed a response to the motion to dismiss.

The Court grants appellee's motion to dismiss appeal for lack of jurisdiction and denies the appellant's motion to expedite as moot.

Entered at the direction of Judge Shedd with the concurrence of Judge Wilkinson and Judge Traxler.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 6, 2004

No. 04-4102
CR-02-42

United States of America
Plaintiff - Appellee

v.

Edison Pilgrim Crawford
Defendant - Appellant

ORDER

This appeal was dismissed by order dated March 19, 2004. Appellant has filed a motion for stay of mandate pending application in the United States Supreme Court for a writ of certiorari.

This Court denies the appellant's motion for stay of mandate.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

United States of American	:	
	:	
V.	:	Criminal No. 3:02CR00042
	:	
Edison Pilgrim Crawford	:	

Plea Agreement

* * *

[2] I will enter a plea of guilty to a Superseding Information charging me with being a previously convicted felon in possession of firearms, in violation of Title 18, United States Code, Section 922(g)(1), and with knowingly possessing a controlled substance, in violation of Title 21, United States Code, Section 844. The maximum statutory penalty for the firearms charge, as state above, is a fine of $250,000 and 10 years imprisonment, and a period of supervised release.

* * *

[3] I agree that Sentencing Guideline Section 2K2.1 is applicable to my firearms offense. I understand and agree that my offense involved between 8 and 24 firearms. I further understand and agree that my offense level should not be reduced under U.S.S.G. § 2K2.1(b)(2).

* * *

[4] I understand that the United States, through its attorney, will recommend that the Court grant me a two (2) level reduction in my offense level for acceptance of responsibility under Guideline Section 3E1.1(a). I must clearly

demonstrate acceptance of responsibility for my criminal offenses. Because I meet the listed criteria, the United States agrees that I should be granted an additional one (1) level reduction pursuant to Guideline Section 3E1.1(b).

[4] If I fulfill my obligations under this plea agreement and accept responsibility for my conduct, the Unites States agrees to recommend the following sentence: a sentence of incarceration at the low end of the applicable sentencing guidelines range.

* * *

[5] I agree that after my full and fair sentencing hearing, I will not then appeal any sentencing guidelines factors or the Court's application of the sentencing guidelines factors to the facts of my case. I am knowingly and voluntarily waiving any right to appeal sentencing guidelines factors, and am voluntarily willing to rely on the Court in sentencing me under the Sentencing Guidelines.

* * *

[6] I further agree to waive any right to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon me by the Court.

[6] I understand that except as provided for in this plea agreement, there will be no further prosecution of me in the Western District of Virginia for any matters about which the United States has specific knowledge gained from the investigation that gave rise to the charges contained in this Indictment.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

United States of America	)	
	)	Presentence Investigation
vs.	)	Report
	)	
Edison Pilgrim Crawford	)	

Docket No: 3:02 CR 00042-001

Prepared for: Honorable Norman K. Moon
U.S. District Judge

Prepared by: Rob H. Harper
Senior U.S. Probation Officer
255 West Main St., Room 308
Charlottesville, VA 22902

* * *

[6]

Date of Arrest	Conviction	Date Sentence Imposed	Guideline	Points
38. 02/12/1971 (age 19)	Breaking & Entering (3 counts). Circuit Court Greene County, VA Indictment date of C3/15/1971	05/17/1971 2 years, 1 year suspended, 5 years probation upon release on each count; all time to run concurrent.	4A1.2(e)(3)	0

* * *

[7] The defendant was represented by appointed counsel, David Dickey on all three counts. A Virginia State Presentence Report, prepared for the Greene Country Circuit Court indicates that Edison Crawford, along with four of his brothers broke into Powell's Garage on January 31, and February 2, 1971, and into L.L. Shifflett's storehouse on February 1, 1971. On the two occasions that Crawford and his brothers broke into Powell's Garage they stole over $1,000 in merchandise. When they broke onto L.L. Shifflett's storehouse, they stole $100 in merchandise. Most of the merchandise from Powell's Garage was recovered in the Augusta County, Virginia area.

[7] 41. The total of the criminal history points is 0. According to the Sentencing Table at U.S.S.G. Chapter 5, Part A, 0 criminal history points establish a criminal history category of I.

IN THE UNITED STATES DISTRICT COURT
WESTER DISTRICT OF VIRGINIA (Charlottesville)

United States of America,	No. 3:02-CR-0042-1
Plaintiff,	Charlottesville, Virginia June 30, 2003
V.	
Edison Pilgrim Crawford,	
Defendant.	

TRANSCRIPT OF PLEA
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

* * *

[7] THE COURT: Would you also tell him at this time what the maximum, minimum punishment range is?

MS. HEALEY: Yes, Your Honor.

For Count 1, which is the felony possession charge, the maximum penalties are up to ten years in prison, a $250,000 fine, and a period of supervised release.

As to Count 2, Count 2 he is pleading to a misdemeanor possession charge that's punishable by up to one year and a one hundred thousand dollar fine, as well as a period of supervised release.

* * *

[13] THE COURT: It is the finding of the Court, in the United States verus Edison Pilgrim Crawford, that the Defendant is fully competent and capable of entering an informed plea, that his plea of guilty is a knowing and voluntary plea, supported by an independent basis in fact, containing each of the essential elements of the offense. [14] His plea is, therefore, accepted and he's now adjudged guilty of the offense.

IN THE UNITED STATES DISTRICT COURT
WESTER DISTRICT OF VIRGINIA (Charlottesville)

United States of America,	No. 3:02-CR-0042-1
Plaintiff,	Charlottesville, Virginia January 5, 2004
V.	
Edison Pilgrim Crawford,	
Defendant.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

* * *

[26] THE COURT: ...I think it's a Rule 11 problem based on what I've read before I got here, and I think that the only thing that, I think that I can do is allow him to withdraw the -- I can vacate the plea agreement and vacate the order on the plea, and let him go back and replea, [sic] plead not guilty, if he'd like.

* * *

[31] MS. HEALEY: Would the Court give me some time to look up on the relevant time, to determine if they can have an interlocutory appeal?

THE COURT: They can ask for it.

MS. HEALEY: I don't want to be doing something–

MR. ZWERLING: Can we do that before we have to [32] withdraw our plea agreement, that decision?

THE COURT: I won't require you to withdraw your decision if you want some time to think about it.